

**Robert Orr–Sysco Food Services and Teamsters Local 480, a/w International Brotherhood of Teamsters.** Case 26–RC–8160

August 7, 2001

**DECISION AND DIRECTION OF SECOND ELECTION**

**BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 14, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to an amended order reinstating petition and directing election. The tally of ballots shows 76 for and 86 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs<sup>1</sup> and has decided to adopt the hearing officer's findings<sup>2</sup> and recommendations,<sup>3</sup> as explained below, and to set aside the election and order a new election held.

The hearing officer recommended sustaining the Petitioner's Objection 4, which alleged that the Employer's security-camera surveillance of its employees' handbilling activities near its facility was objectionable. We adopt the hearing officer's recommendation to sustain Objection 4 for the reasons set forth below.

The Employer's facility is a substantially rectangular building situated so that its two longer sides face northeast and southwest, and its two shorter sides southeast and northwest. The entrance to the building is on the southwest-facing side. Roughly 100 feet away from the entrance stands a guardshack. The northeast-facing side of the structure borders Centennial Place, a public highway. The facility's southeast-facing side borders another public road, Hermitage Plaza, which makes a "T" intersection with Centennial Place. Thus, to enter the Employer's facility approaching from the southeast on Centennial Place, vehicles must turn left on Hermitage Plaza, pass by the southeast side of the building (which would be to the driver's right), and then turn right onto a road

that leads to the guardshack in front of the southwest entrance. Through traffic on Hermitage Plaza continues to an airport situated directly west of the facility.

Four exterior security cameras are located at or near the four corners of the Employer's facility. These cameras transmit images to monitors located in the guardshack, and those images are recorded on videotape. The cameras are capable of being rotated by means of controls located in the guardshack. One of the cameras, designated in the record as camera number 1, is mounted on a pole situated near the intersection of Centennial Place and Hermitage Plaza. Pointed straight ahead, camera number 1 points down Centennial Place to the southeast. Rotated to the right—or, from the perspective of someone standing to the southeast on Centennial Place and facing the camera, to the left—camera number 1 points westward down Hermitage Plaza.

Every Friday morning for the 8 weeks immediately preceding the election, prounion employees of the Employer took part in handbilling southeast of the facility along Centennial Place. On these occasions, camera number 1 was pointed at the handbillers. Although a witness for the Employer testified that camera number 1 typically points straight down Centennial Place, the hearing officer credited the contrary testimony of the Petitioner's witnesses that camera number 1 generally points down Hermitage Plaza.

Camera number 1 recorded the employees' handbilling activities on videotape. One such videotape was entered into evidence as Employer's Exhibit 13. Recorded the Friday morning before the election, Employer's Exhibit 13 shows traffic on Centennial Place slowing, stopping, and otherwise responding to the conduct of the handbillers, who frequently walked back and forth across the road. The Employer's director of training, safety, and security informed the local police several times about the traffic situation on Centennial Place. The police responded each time, and then began making regular patrols of the handbilling site without further prompting from the Employer.

The well-established rule is that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act. *F. W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993); *Saia Motor Freight Line, Inc.*, supra. It also constitutes objectionable conduct, *Mercy General Hospital*, 334 NLRB (2001), and warrants direction of a new election unless the impact on election results is de minimis, *id.* at. These rules apply not only where a videotape is shot with a handheld camera, but also where, as here, the videotape is created with a rotatable security camera purposefully directed at protected con-

<sup>1</sup> By letter dated June 4, 2001, counsel for the Employer drew to our attention *Saia Motor Freight Line, Inc.*, 333 NLRB (2001).

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>3</sup> Absent exceptions, we adopt the hearing officer's recommendations that Objection 3 be overruled and that the Petitioner's withdrawal of Objections 5 and 6 be approved.

certed activity. See, e.g., *Mercy General Hospital*, supra; *U.S. Ecology Corp.*, 331 NLRB 223 (2000); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1269 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999); *Frontier Hotel & Casino*, 323 NLRB 815, 837 (1997), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). At the same time, however, the Board “recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity.” *National Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Thus, it is neither unlawful nor objectionable when a rotatable security camera, operating in its customary manner, happens to record protected concerted activity on videotape. Cf. *Mercy General Hospital*, supra, at (finding no justification for videotaping where direction security camera was pointing “did not result from the established way in which the camera was operating”); *Frontier Hotel & Casino*, supra at 837 (finding no justification for videotaping where security camera focused on union activity and did not rotate to scan parking lot “as was customarily the case”).

The Employer does not dispute the hearing officer’s finding that when directed at the handbillers on Centennial Place, camera number 1 was not operating in its customary manner. Rather, the Employer seeks to defend its conduct as justified by its concern for the safety of its employees and the general public. In *Saia Motor Freight Line, Inc.*, supra, the Board accepted an employer’s concern about traffic safety as a legitimate justification for photographing employees engaged in handbilling. This case differs from *Saia*, however, in two important respects.

First, in *Saia* the handbilling took place in the employer’s driveway. *Saia Motor Freight Line*, supra, slip op. at 1. The driveway, in turn, intersected with a public road. *Ibid.* Handbillers approached trucks as they turned off the public road into the driveway, causing the trucks to slow or stop with their trailers extended into the roadway. *Id.* at 8. Under these circumstances, the employer in *Saia* was concerned about potential negligence liability. *Id.* at 1. Thus, the Board’s holding in *Saia* that the

employer had presented a proper justification was consistent with the settled rule that it is not unlawful to take photographs for the purpose of gathering evidence. See, e.g., *Ordman’s Park & Shop*, 292 NLRB 953, 956 (1989); *Roadway Express*, 271 NLRB 1238, 1244 (1984). Here, by contrast, the handbilling activity took place entirely on the public highway itself, two turns away from the Employer’s driveway. To reach the location comparable to the handbilling site in *Saia*, vehicles would have to turn left off Centennial Place onto Hermitage Plaza, drive past the southeast side of the facility, and then instead of continuing ahead to the airport, turn right onto the roadway leading to the guardshack. Unsurprisingly, the Employer does not contend that it feared negligence liability as a potential consequence of its employees’ concerted activities.

Second, in *Saia* the Board found it significant that the respondent began taking photographs only “when it became dissatisfied with the efforts of the police to minimize traffic congestion.” *Saia Motor Freight Line*, supra. In this case, however, the Employer failed to establish that it was similarly dissatisfied with the way the police responded to the situation on Centennial Place. On the contrary, according to the Employer’s own witness, the police response was prompt and ongoing. The Employer nevertheless continued to videotape its employees’ handbilling activities right up to and including the last Friday morning before the election.

Under the circumstances presented here, we conclude that the Employer has failed to establish a proper justification for videotaping of its employees’ handbilling activities. Thus, we further conclude that the videotaping constituted objectionable conduct that warrants setting aside the June 14 election. Accordingly, we sustain the Petitioner’s Objection 4 and set aside the election,<sup>4</sup> and we shall direct a second election.

[Direction of Second Election omitted from publication.]

<sup>4</sup> As we have sustained the Petitioner’s Objection 4, we find it unnecessary to pass on the issues raised by its Objections 1 and 2.